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10/780,092	02/17/2004	Scott Thomas Bublit	2004-1001	2788
37476 7590 01/26/2007 WHITE-WELKER & WELKER, LLC P.O. BOX 199 CLEAR SPRING, MD 21722-0199			EXAMINER STARKS, WILBERT L	
			ART UNIT 2129	PAPER NUMBER
SHORTENED STATUTORY PERIOD OF RESPONSE			MAIL DATE	DELIVERY MODE
3 MONTHS			01/26/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

# Office Action Summary

Application No.

10/780,092

Applicant(s)

BUBLITZ, SCOTT THOMAS

Examiner

Wilbert L. Starks, Jr.

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 08 November 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1,2,4-6 and 8-14 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2,4-6 and 8-14 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### ***Claim Rejections - 35 U.S.C. §101***

1. 35 U.S.C. §101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

the invention as disclosed in claims 1-2, 4-6, and 8-14 is directed to non-statutory subject matter.

2. Regardless of whether any of the claims are in the technological arts, none of them is limited to practical applications in the technological arts. Examiner finds that *In re Warmerdam*, 33 F.3d 1354, 31 USPQ2d 1754 (Fed. Cir. 1994) controls the 35 U.S.C. §101 issues on that point for reasons made clear by the Federal Circuit in *AT&T Corp. v. Excel Communications, Inc.*, 50 USPQ2d 1447 (Fed. Cir. 1999). Specifically, the Federal Circuit held that the act of:

...[T]aking several abstract ideas and manipulating them together adds nothing to the basic equation. *AT&T v. Excel* at 1453 quoting *In re Warmerdam*, 33 F.3d 1354, 1360 (Fed. Cir. 1994).

Examiner finds that Applicant's "information from a respondent or other external source" references are just such abstract ideas.

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3. Examiner bases his position upon guidance provided by the Federal Circuit in *In re Warmerdam*, as interpreted by *AT&T v. Excel*. This set of precedents is within the same line of cases as the *Alappat-State Street Bank* decisions and is in complete agreement with those decisions. *Warmerdam* is consistent with *State Street*'s holding that:

Today we hold that *the transformation of data, representing discrete dollar amounts, by a machine through a series of mathematical calculations into a final share price*, constitutes a practical application of a mathematical algorithm, formula, or calculation because it produces 'a useful, concrete and tangible result' -- *a final share price momentarily fixed for recording purposes and even accepted and relied upon by regulatory authorities and in subsequent trades.* (emphasis added) *State Street Bank* at 1601.

4. True enough, that case later eliminated the "business method exception" in order to show that business methods were not per se nonstatutory, but the court clearly *did not* go so far as to make business methods *per se* statutory. A plain reading of the excerpt above shows that the Court was *very specific* in its definition of the new *practical application*. It would have been much easier for the court to say that "business methods were per se statutory" than it was to define the practical application in the case as "...the transformation of data, representing discrete dollar amounts, by a machine through a series of mathematical calculations into a final share price..."

5. The court was being very specific.

6. Additionally, the court was also careful to specify that the "useful, concrete and tangible result" it found was "a final share price momentarily fixed for recording

purposes and even accepted and relied upon by regulatory authorities and in subsequent trades.” (i.e. the trading activity is the further practical use of the real world monetary data beyond the transformation in the computer – i.e., “post-processing activity”.)

7. Applicant cites no such specific results to define a useful, concrete and tangible result. Neither does Applicant specify the associated practical application with the kind of specificity the Federal Circuit used.

8. Furthermore, in the case *In re Warmerdam*, the Federal Circuit held that:

...[T]he dispositive issue for assessing compliance with Section 101 in this case is whether the claim is for a process that goes beyond simply manipulating ‘abstract ideas’ or ‘natural phenomena’ ... As the Supreme Court has made clear, ‘[a]n idea of itself is not patentable, ... taking several abstract ideas and manipulating them together adds nothing to the basic equation.’ *In re Warmerdam* 31 USPQ2d at 1759 (emphasis added).

9. Since the Federal Circuit held in *Warmerdam* that this is the “dispositive issue” when it judged the usefulness, concreteness, and tangibility of the claim limitations in that case, Examiner in the present case views this holding as the dispositive issue for determining whether a claim is “useful, concrete, and tangible” in similar cases. Accordingly, the Examiner finds that Applicant manipulated a set of abstract “information from a respondent or other external source” to solve purely algorithmic problems in the abstract (i.e., what *kind* of “information” is used? Heart rhythm data? Algebraic equations? Boolean logic problems? Fuzzy logic algorithms? Probabilistic word problems? Philosophical ideas? Even vague expressions, about which even reasonable persons could differ as to their meaning? Combinations thereof?) Clearly, a claim for manipulation of “information” is provably even more abstract (and thereby less limited in practical application) than pure “mathematical algorithms” which the Supreme Court has held are per se nonstatutory – in fact, it *includes* the expression of nonstatutory mathematical algorithms.

10. Since the claims are not limited to exclude such abstractions, the broadest reasonable interpretation of the claim limitations includes such abstractions. Therefore, the claims are impermissibly abstract under 35 U.S.C. §101 doctrine.

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11. Since *Warmerdam* is within the *Alappat-State Street Bank* line of cases, it takes the same view of “useful, concrete, and tangible” the Federal Circuit applied in *State Street Bank*. Therefore, under *State Street Bank*, this could not be a “useful, concrete and tangible result”. There is only manipulation of abstract ideas.

12. The Federal Circuit validated the use of *Warmerdam* in its more recent *AT&T Corp. v. Excel Communications, Inc.* decision. The Court reminded us that:

Finally, the decision in *In re Warmerdam*, 33 F.3d 1354, 31 USPQ2d 1754 (Fed. Cir. 1994) is not to the contrary. \*\*\* The court found that the claimed process did nothing more than manipulate basic mathematical constructs and concluded that ‘taking several abstract ideas and manipulating them together adds nothing to the basic equation’; hence, the court held that the claims were properly rejected under §101. ... Whether one agrees with the court’s conclusion on the facts, the holding of the case is a straightforward application of the basic principle that mere laws of nature, natural phenomena, and abstract ideas are not within the categories of inventions or discoveries that may be patented under §101. (emphasis added) *AT&T Corp. v. Excel Communications, Inc.*, 50 USPQ2d 1447, 1453 (Fed. Cir. 1999).

13. Remember that in *In re Warmerdam*, the Court said that this was the dispositive issue to be considered. In the *AT&T* decision cited above, the Court reaffirms that this is the issue for assessing the “useful, concrete, and tangible” nature of a set of claims under 101 doctrine. Accordingly, Examiner views the *Warmerdam* holding as the dispositive issue in this analogous case.

14. The fact that the invention is merely the manipulation of *abstract ideas* is clear. The data referred to by Applicant’s phrase “information from a respondent or other external source” is simply an abstract construct that does not provide limitations in the

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claims to the transformation of real world data (such as monetary data or heart rhythm data) by some disclosed process. Consequently, the necessary conclusion under *AT&T*, *State Street* and *Warmerdam*, is straightforward and clear. The claims take several abstract ideas (i.e., "information" in the abstract) and manipulate them together adding nothing to the basic equation. Claims 1-2, 4-6, and 8-14 are, thereby, rejected under 35 U.S.C. §101.

### ***Claim Rejections - 35 U.S.C. §112***

The following is a quotation of the first paragraph of 35 U.S.C. §112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-2, 4-6, and 8-14 are rejected under 35 U.S.C. §112, first paragraph because current case law (and accordingly, the MPEP) require such a rejection if a §101 rejection is given because when Applicant has not in fact disclosed the practical application for the invention, as a matter of law there is no way Applicant could have disclosed *how* to practice the *undisclosed* practical application. This is how the MPEP puts it:

("The how to use prong of section 112 incorporates as a matter of law the requirement of 35 U.S.C. §101 that the specification disclose as a matter of fact a practical utility for the invention.... If the application fails as a matter of fact to satisfy 35 U.S.C. §101, then the application also fails as a matter of law to enable one of ordinary skill in the art to use the invention under 35 U.S.C. §112."; In re Kirk, 376 F.2d 936, 942, 153 USPQ 48, 53 (CCPA 1967) ("Necessarily, compliance with § 112 requires a description of how to use presently useful inventions, **otherwise an applicant would**



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anomalously be required to teach how to use a useless invention.")  
See, MPEP 2107.01(IV), quoting In re Kirk (emphasis added).

Therefore, claims 1-2, 4-6, and 8-14 are rejected on this basis.

### ***Response to Arguments***

Applicant's arguments filed 11/08/2006 have been fully considered but they are not persuasive. Specifically:

#### **Argument 1**

##### **Rejections Under 35 USC 101**

Claims 1-14 stand rejected under 35 USC 101 as being directed to non statutory subject matter and not limited to practical applications as determined by the Examiner's interpretation of the statute and In re Warmerdam (1994) clarified by AT&T Corp. v. Excel Communications, Inc. (1995).

With respect to Examiner's allegation that the present invention is directed to nonstatutory subject matter, is not limited to practical applications in the technological arts, Examiner has failed to view the application as now required under Ex parte Lundgren, Appeal No. 2003 2088 (BPAI 2005). On appeal, the board limited its consideration to the single issue of whether the examiner's rejection of certain claims under §101 should be sustained. In an action by the Patent Office leading to the appeal, the examiner had rejected certain claims as being directed to "nothing more than an abstract idea which is not associated or connected to any technological art." Accordingly, the board considered the examiner's argument that the claims were "outside the technical arts" because they were related to "an economic theory expressed as a mathematical algorithm without the disclosure or suggestion of a computer, automated means, or an apparatus of any kind."

In support of the technological arts test, the examiner cited several decisions by the Court of Customs and Patent Appeals (the judicial body that preceded the U.S. Court of Appeals for the Federal Circuit) and the board. These included In re Musgrave, 431 F2d 882, 167 USPQ 280 (CCPA 1970); In re Toma, 575 F2d 872, 197 USPQ 852 (CCPA 1978); and Ex parte Bowman, 61 USPQ2d 1669 (Bd. Pat. App. & Int. 2001) (nonprecedential). A majority of the board found that the foregoing decisions either did not support the existence of a separate "technological arts" test, or were non precedential and therefore non

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binding. Accordingly, the majority opinion in *Ex parte Lundgren* concluded that "there is currently no judicially recognized separate 'technological arts' test to determine patent eligible subject matter under §101," and on that basis reversed the examiner's rejection.

In the present application Examiner has similarly stated "Applicant's 'information from a respondent or other external source' references are just such abstract ideas." In response Applicant argues that under *Lundgren* this rejection is improper and respectfully requests withdraw of this rejection. Applicant has also amended claim 1 to delete the phrase "from a respondent or other external source" so now that claim element reads "a software program capable of adaptive assessment administration via a web browser or computer terminal with the ability to accept survey or assessment related information" which is actual, concrete information and not abstract ideas or information as interpreted by the Examiner.

Furthermore, Examiners are now bound by the *Ex parte Lundgren* decision and the Patent Office can no longer apply a "technological arts" test for statutory subject matter rejections.

Examiner withdraws any argument that can be reasonably construed as asserting that the claims are not within the "technological arts." But, Examiner does not withdraw any of the §101 rejections because there are ample alternate arguments for maintaining those rejections. Regardless of the existence of any "technological arts" test in §101 doctrine, the rejections STAND.

On a "minor" related point, Applicant asserted that Examiner argued in support of the "technological arts test" using the cases In re Musgrave, In re Toma, and Ex parte Bowman.

Examiner made no such argument in support of the "technological arts test."

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Applicant's argument addresses issues not raised by Examiner and is, thereby, unpersuasive regarding the issues actually raised by Examiner. The rejections STAND.

### **Argument 2**

Examiner's statement in paragraph 3 of the office action that the set of precedents provided by *In re Warmerdam* and *AT&T v. Excel* are within the same line of cases as *State Street* is incomplete and does not take into account *Lundgren's* effect on those previously decided cases and its expansion of 35 USC 101 after the *State Street* Decision. The Patent Office has since promulgated interim guidelines reflecting the *Ex Parte Lundgren* decision. The guidelines explain that subject matter may be eligible for patent protection even if the claimed invention Page 2, paragraph 2 of the Office Action mailed 05/03/2006 falls within one of the judicial exceptions to §101 (an abstract idea, law of nature, or natural phenomenon).

Um, is Applicant actually asserting that in *Ex parte Lundgren*, the Board of Patent Appeals and Interferences (BPAI) overruled the Federal Circuit? Further, Is Applicant asserting that the BPAI overruled the Supreme Court of the United States (SCOTUS) as well as the U.S. Congress???

If Applicant has any such bona fide citation where the BPAI held that they were overruling superior legal authorities, Examiner would surely be interested in seeing it. Regardless, Examiner finds Applicant's argument unpersuasive. The rejections STAND.

### **Argument 3**

Under such circumstances, however, the guidelines require that the claimed invention be a "practical application" of one of the exceptions, which requirement may be met "if the claimed invention physically transforms an article or physical object to a different state or thing, or if the claimed invention otherwise produces a useful, concrete, and tangible result." In the present invention the process of adaptive

assessments produces useful information that is both concrete and tangible in the form of reports that provide probability and statistical information as illustrated in Figures 7, 8 and 9 of the present application.

One example of practical use is taken from the Summary section of the present application related to personality inventories and an attempt to classify individuals into personality types or categories based on their responses to items. By specifying the relationship between these items and personality types, a probability matrix can be created and used as a basis for adaptive administration and potentially reduce the number of items needed for administration. In addition, other areas such as diagnosing illnesses based on patients' symptoms can be helped by using this methodology if the presence of symptoms can help classify illness into distinct categories.

Applicant's argument that his claims can be applied to health diagnosis or classification of persons is insufficient to actually limit his claims to such applications. Those supposed "limitations" are only subsets of the actual matter limited by the claims. An argument using erroneously limited subsets of the actual metes and bounds of the claims is not sufficient to limit the claims to statutory matter because the "claims must be given their broadest reasonable interpretation." See, MPEP 2111 (emphasis added.)

Applicant based his argument on the narrower subsets of the actually claimed matter, thereby presenting erroneously narrow claim interpretations that appear more acceptable than the ones actually drafted into the claims.

Applicant must expressly present limitations that, in their broadest reasonable interpretation, denote statutory limitations to a practical application.

Examiner cannot even rely on In re Festo's "argument-based estoppel" to limit the claims to the matter in Applicant's argument, since such doctrine of equivalents issues are actually decided later in Court after an application has been allowed and later contested. Accordingly, Applicant's arguments cannot, at this early stage, be presumed by Examiner to be so limiting.

Examiner reads the claims as a whole to carefully search for actual limitations to practical applications and finds none. It is Examiner's opinion that the claims are devoid of statutory material. Having been given ample opportunity to respond by amendment, Applicant has presented no other statutory limitations to circumscribe the metes and bounds of the claims sufficiently to change this assessment.

Accordingly, Applicant has failed to carry his burden of showing how the claims are in any way statutory. On this basis, Examiner finds Applicant's argument to be unpersuasive and the rejections STAND.

#### **Argument 4**

With respect to Examiner's position that Applicant cites no specific results to define a useful, concrete, and tangible result, Examiner is direct to Figures, 7, 8, and 9 of the application which are screen shots of the output of the software which embodies the process of the present invention and provides actual results of information collected and analyzed according the process of the present invention. The probability updates in response to the changing information in the database provide useful information to one seeking the most likely results form a series of options such as occupational classification. The associated practical application of just one embodiment of the present invention is that the

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concrete tangible results delivered by the software and illustrated in the Figures can help one determine the most suitable occupation or the most successful career path. Examiner should also note the specification and claims discuss other alternative embodiments where similar useful, concrete, tangible output as represented by Figures 7, 8, and 9 can be used includes other such practical purposes such as market performance, quantification of an individual's skill set, evaluation of educational instructors, courses, and institutions, assisting in troubleshooting and solving technical and complex issues among many other possible applications.

The rejections were rejections of the claims...not the Drawings or the Specification. The limitations of the Specification cannot be "read into" the claims unless 35 U.S.C. §112, sixth paragraph has been invoked by placing the claims in "means-plus-function" format or "step-for" format. Applicant has not so invoked 35 U.S.C. §112, sixth paragraph. Therefore, Applicant's citations to the Specification and the Drawings are irrelevant.

Further, applicant only argues subsets of the matter actually claimed. That is insufficient to limit the claims to statutory matter. Therefore, the rejections STAND.

#### **Argument 5**

With respect to Examiner's allegation that Applicant is merely manipulating a set of abstract information to solve a purely algorithmic problem is incorrect. The kind of information necessary for the process to proceed, must be concrete. Depending on the assessment desired, the "information" can be in many forms, but all of it must be concrete and tangible or indexed. For example, to provide an assessment of an election the information would include such tangible information as number of collection locations, polling surveys of public opinion of topics, a source of census data and public opinion, interest, value, or intention information. For assessing marketability of a product, such tangible information as the number of potential customers and competitors can be

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provided in addition to specific information provided from market research, employees, vendors, and resellers.

Applicant has not amended the term "information" to anything in the real world.

Further, applicant only argues subsets of the matter actually claimed. That is insufficient to limit the claims to statutory matter. Therefore, the rejections STAND.

#### **Argument 6**

Applicant in its initial claims did provide limitations on the information equivalent to the of monetary data or heart rhythm as cited by the examiner. The specific information that can be used is discuss in the application and was provided in claims focusing on a specific assessment area. The claims do much more than manipulate abstract ideas as alleged by the Examiner, the claims take concrete and tangible information and manipulate it following the process steps disclosed and claimed in such a manner that it provides a useful, concrete, and tangible result in the form of probability updates on potential outcomes or options for a given situation. Applicant would be more than happy to discuss more appropriate claim language to better define and limit the "information" used by the present invention. Withdraw of this rejection is respectfully requested.

Applicant has not amended the term "information" to anything in the real world.

That is insufficient to limit the claims to statutory matter. Therefore, the rejections STAND.

#### **Argument 7**

Rejections Under 35 USC 112

Claims 1-14 stand rejected under 35 USC 112 by the Examiner's assertion that no practical application has been asserted for the

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invention and has not disclosed how to practice the undisclosed practical application. As previously state, one example of practical use is taken from the Summary section of the present application related to personality inventories and an attempt to classify individuals into personality types or categories based on their responses to items. By specifying the relationship between these items and personality types, a probability matrix can be created and used as a basis for adaptive administration and potentially reduce the number of items needed for administration. In addition, other areas such as diagnosing illnesses based on patients' symptoms can be helped by using this methodology if the presence of symptoms can help classify illness into distinct categories.

With respect to Examiner's statement that "there is no way Applicant could have disclosed how to practice the undisclosed practical application", Applicant relies on the previous arguments that the invention has been properly and adequately disclosed and the detailed description and figures sufficiently explain how to practice the invention. Withdraw of this rejection is respectfully requested.

Applicant has not amended the term "information" to anything in the real world.

Further, applicant only argues subsets of the matter actually claimed. That is insufficient to limit the claims to statutory matter. Therefore, the rejections STAND.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any



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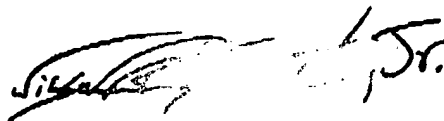
extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Wilbert L. Starks, Jr. whose telephone number is (571) 272-3691.

Alternatively, inquiries may be directed to the following:

**S. P. E. David Vincent** (571) 272-3080

**Official (FAX)** (571) 273-8300

A handwritten signature in black ink, appearing to read "Wilbert L. Starks, Jr.", with a stylized flourish at the end.

Wilbert L. Starks, Jr.  
Primary Examiner  
Art Unit 2129

WLS

19 January 2007